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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 566

WINNIE W. SCYPHERS,

Petitioner,

vs.

ST. PAUL NATIONAL BANK.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

S. H. SUTHERLAND,
Counsel for Petitioner.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Winnie W. Scyphers (hereinafter called petitioner) respectfully presents this petition for a writ of certiorari to review the final judgment of the Supreme Court of Appeals of the State of Virginia, rendered October 5, 1943 (R. 67) denying an appeal from the Circuit Court of Wise County, upon the petition of petitioner and another.

Statement of the Case.

A lien creditors' suit (R. 1, 9) was instituted in the Circuit Court for Dickenson County, Virginia, which was according to law, transferred to Wise County, to be heard

with a like suit in the latter county, instituted by the St. Paul National Bank, against petitioner, and Martha Puckett. There was a reference, according to the Virginia Practice, *Bristol Iron Co.* v. *Caldwell*, 95 Va. 47, to a Commissioner to ascertain the liens and priorities. The Commissioner filed his report February 12, 1943 (R. 52), in which, among others, it showed the first lien was a deed of trust dated July 29, 1937, to secure a $3,000.00 note, executed by petitioner and her son, Hobert Scyphers, payable to the St. Paul National Bank and FHA, payable at the rate of $23.73 monthly, and which provided for a 10% attorney's fee, which provision under the Virginia law is enforceable, *Colley* v. *Summers—Parrott Hardware Co.*, 119 Va. 439, which note bears interest from April 1, 1942, and on which, with the attorney's fee added, there was due $3,028.28 (R. 16). This report showed that petitioner, Martha Puckett, and other necessary parties were not in the military services, although the evidence before him, and which under the Virginia practice is required to be returned with and as a part thereof, Va. Code, Section 6185, Appendix B, makes no mention of this, and is, therefore, without any evidence to support it. Hobert Scyphers was a proper party (R. 32). This report, over petitioners' objection, was confirmed by the Wise County Circuit Court on March 6, 1943, and Commissioners were appointed to sell petitioners' property including that conveyed by this deed of trust to secure this note (R. 53). Thereupon, according to the Virginia practice, 4 Minor's Inst. (3d) 1505; *Kendrick* v. *Whitney*, 28 Grat. (69 Va.) 651, to-wit; on April 3, 1943, petitioner and Martha Puckett filed their petition for a rehearing, and among the things set forth, exclusively for the Virginia Courts, further alleged that:

> "Hobert Scyphers, one of the makers of the $3,000, dated July 29th, 1937, and one of the beneficiaries of said note which is reported as Lien No. 1, amounting to

> $3,028.28, against the lot of land in Wise County, described in Deed Book No. 105, page 98, has been and now is in the service of the United States Army, pursuant to the Selective Service Act and has been in service for more than two years, and said Hobert Scyphers is interested and would be greatly affected by a sale of said property'' (R. 63),

and prayed that the decree of March 6, 1943, be set aside and the Commissioners to make the sale of said lands be enjoined until 60 days after Hobert Scyphers is discharged from the U. S. Army, as provided by law. The relief prayed for, in this petition, was denied on April 14, 1943, although the fact, as alleged of Hobert Scyphers' service in the Army and interest in the case was admitted (R. 64), which left the decree of sale, of March 6, 1943, in force. Thereafter, to-wit, on June 17, 1943 (R. 8), and within the time and in the manner prescribed by law, Va. Code, Sec. 6336, Appendix B, your petitioner and Martha Puckett prosecuted, to the Supreme Court of Appeals of Virginia, which is the Court of last resort of that State, their petition praying for an appeal from the decrees of the Circuit Court of Wise County of March 6, and April 14, respectively (R. 1), to the Supreme Court of Appeals of Virginia, and among several matters pertaining to State practices, said petitioner also assigned as error the following:

> ''Lien No. 1, against Winnie W. Scyphers, page 10 of the record is for a deed of trust to secure a note of $3,000.00 signed by Winnie W. Scyphers and Hobert Scyphers amounts to $3,028.28. Hobert Scyphers is in military service of the United States. He has not appeared. Article II of the Soldier's and Sailor's Civil Relief Act of 1940 requires:
>
> 'In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts show-

ing that the defendant is not in the military service * * *. If an affidavit is not filed showing that the defendant is not in the military service no judgment shall be entered without first securing an order of court directly such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent the defendant and protect his interest.

'At any state thereof any action or proceeding in * * * any court in which person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter, may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf be stayed'.

"There was no attempt in this case to comply with this statute. It is alleged that this soldier's interest would be fatally affected by the sale of this property; it was well known that Hobert Scyphers is a son of Winnie W. Scyphers, and it shows he is a joint maker of this note. This tract of land conveyed to secure this debt contains the home where he was raised and where he lived when he was inducted into the service (R. 7)."

which court after a consideration thereof refused the appeal on October 5, 1943, which refusal, under the Virginia practice is a final decree (*Mathews* v. *Progress Dist. Co.*, 108 Va. 777, 780), and thus no relief was granted to Hobert Scyphers, who was and still is in the service of the armed forces of the United States, and that without a hearing, or an opportunity to be heard, contrary to the provisions of said act.

Questions Presented.

There were several questions raised in the State Court which are exclusively for it, but the following federal questions were also raised in said court:

(1) In refusing to enjoin the proceeding for the sale of the property until Hobart Scyphers could have an opportu-

nity to conduct his defense, did the Supreme Court of Appeals deny him rights given him by Soldier's and Sailor's Relief Act of 1940, as amended, 54 Stat. 1178, 1881, Ch. 888, Sec. 100, 200, 201, 203; 50 U. S. C. A., Sec. 520, 521, 523, Appx. 9, Sec. 201, as follows:

(a) Did the Court not deny him the right secured him by said Act by affirming the decree of the Circuit Court confirming the Special Commissioner's report and ordering a sale of the trust property in which he was interested, without first having an attorney appointed to represent and protect his interest, as provided by Section 200 (1) of said Act?

(b) Did not the Supreme Court of Appeals err in sustaining the lower court's decree, which refused to stay said proceedings, on application made for said Hobert Scyphers by petitioner and another as prescribed by Section 201 of said Act; especially without any finding of fact that his ability to conduct his defense was not materially affected by his military service?

(c) Did not the Supreme Court of Appeals err in sustaining the lower court's refusal to stay or enjoin the sale it had ordered, without first finding facts to justify it in holding that the ability of said Hobert Scyphers to comply with the decree of March 6, 1943, requiring the payment of more than $11,000.00 to prevent the sale of this trust property, (R. 54) was not materially affected by his military services as provided by Section 203 of said Act?

(d) Did not the Supreme Court of Appeals err in sustaining the lower court, in refusing to stay or enjoin the execution of the decree of sale, as it was apparent that Hobert Scyphers' military services materially affected his ability to conduct his defense, and his ability to prevent the sale of the trust property by discharging the liens to prevent this?

(e) Did the Supreme Court of Appeals err in refusing an appeal from Circuit Court's decree, which was an affirmation thereof?

Reasons Relied On for Allowance of Writ.

The reasons for which this petition is presented are that the State Court has decided a federal question in a way probably not in accord with the decision of this Court in *Boone* v. *Lightner,* — U. S. —, 87 L. Ed. Advance Sheets 1095, decided June 7, 1943; and has construed the Soldiers' and Sailors' Relief Act so as to deny a soldier the benefit of same; and if this Court does not grant the relief, this soldier while in service will not have any (Rule 38).

II.

Statute Involved.

This case involves the construction and application of Soldiers' and Sailors' Relief Act of October 17, 1940; 54 Stat. 1180, 1181, U. S. C. A. Appx. 520, 521, 523, 11 FCA, Appx. 9, Sec. 200, 201, 203. Appendix A. Post 12.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of Appeals of Virginia, and submits hereto annexed her brief in support of her petition.

Dated December 23, 1943.

Respectfully submitted,

S. H. SUTHERLAND,
Attorney for Petitioner.